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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW BUTLER,

Defendant and Appellant.

H044344

(Santa Clara County

Super. Ct. No. C1508670)

A jury convicted defendant Andrew Butler of first degree murder of his girlfriend, Kendra Gonzales, and found true the allegation that he personally and intentionally discharged a firearm and proximately caused her death. The trial court sentenced defendant to a prison term of 50 years to life: 25 years to life for the murder and 25 years to life on the firearm enhancement. On appeal, defendant challenges the sufficiency of the evidence of premeditation and deliberation, alleges witness misconduct, and raises a claim of cumulative error. We shall affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On April 1, 2016, the Santa Clara County District Attorney charged defendant with first degree premeditated murder (Pen. Code, §187)<sup>1</sup> and alleged that he personally and intentionally discharged a firearm and proximately caused the death of a nonaccomplice (§ 12022.53, subd. (a)). Defendant pleaded not guilty and the case

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

proceeded to a jury trial in September 2016. The following evidence was adduced during five days of testimony.

Defendant and his girlfriend, Gonzales, lived in Sacramento. On April 7, 2015, they drove to San Jose with their baby, Gonzales's teenaged daughter Sajah Johnson, and Johnson's boyfriend Darius Dailey. The group planned to visit Santa Cruz and stopped in San Jose on the way. Gonzales was driving; defendant was in the passenger seat; Johnson, Dailey, and the baby were riding in the backseat. Sometime that evening, Gonzales spoke on the phone to defendant's cousin, Christina, who was also in San Jose. Gonzales discussed getting together with Christina "to handle some business" without defendant.

Johnson testified that, after that phone call, defendant "looked mad" and Gonzales and defendant got into a "slight verbal altercation." Dailey testified that Gonzales yelled at defendant. Johnson heard her mother tell defendant "I don't have time for this," as she pulled the car over to the side of the road. Defendant pulled a gun out from the area near his feet and shot Gonzales once. Gonzales said, "did you just shoot me?" Defendant looked around the car, making eye contact with Johnson. After what Johnson estimated to be a 10-to-15-second pause, defendant shot Gonzales five or six more times. (At the preliminary hearing, Johnson testified that the pause between gunshots was three to seven seconds long, as she conceded on cross-examination.) Dailey likewise testified that defendant paused and looked around the car after firing the first gunshot.

Johnson picked up her mother's cell phone to call 911. Defendant pointed the gun at her and told her to drop the phone; she complied.

Defendant ordered Johnson and Dailey out of the car. Johnson took the baby and exited the vehicle, as did Dailey. Defendant pulled Gonzales out of the car, left her in the street, and drove off.

The shooting took place in front of a busy 7-Eleven. A witness outside the 7-Eleven called 911 at 9:55 p.m. Gonzales was pronounced dead at the scene.

Assistant medical examiner Michelle Jorden, M.D., performed an autopsy on Gonzales. Dr. Jorden testified that Gonzales was shot nine times, and suffered gunshot wounds to the face, neck, arm, and shoulder. Stippling—abrasions caused by gunpowder striking the skin—around some of the wounds indicated that those shots were fired from within two or three feet.

Johnson testified that her mother had been unhappy with defendant and frequently talked about breaking up with him, including in defendant's presence. Dailey testified that defendant and Gonzales argued throughout the trip and that Gonzales repeatedly told defendant she wanted a break from the relationship. According to Johnson, about a year prior to the shooting, defendant hit her mother in the face following an argument.

On October 7, 2016, after deliberating for approximately one day, the jury returned its verdict. Jurors found defendant guilty of first degree murder and found true the allegation that, during the commission of that offense, defendant personally and intentionally discharged a firearm and proximately caused Gonzales's death.

At a November 18, 2016 sentencing hearing, the court sentenced defendant to 25 years to life for the murder conviction and 25 years to life for the personal use of a firearm inflicting death enhancement, for a total prison term of 50 years to life. Defendant timely appealed.

## **II. DISCUSSION**

### ***A. Sufficiency of the Evidence of Premeditation and Deliberation***

#### ***1. Legal Principles and Standard of Review***

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) There are two degrees of murder. Any willful, deliberate, and premeditated killing is first degree murder. (§ 189.) “ ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance.” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080 (*Koontz*).) “ ‘The process of premeditation and deliberation does not require any extended period of time. ‘The true

test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ ” (*Ibid.*) California courts have identified three non-exclusive “categories of evidence pertinent to the determination of premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 (*Perez*).) Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements of willfulness, premeditation, and deliberation. (*People v. Knoller* (2007) 41 Cal.4th 139, 151.)

“Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation . . . . Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt.” (*Perez, supra*, 2 Cal.4th at p. 1124.)

## 2. *Substantial Evidence Supports the Jury Verdict*

Defendant argues the evidence shows the shooting was a “rash and unconsidered” reaction to Gonzales yelling at him, not a premeditated and deliberate act. For the reasons below, we conclude substantial evidence supports the jury’s finding that defendant acted with premeditation and deliberation in fatally shooting Gonzales.

Johnson and Dailey testified that Gonzales had threatened to break up with defendant and had angered him by making plans to spend the evening without him. A reasonable inference from that evidence is that Gonzales’s behavior angered defendant and motivated him to kill her. (See *People v. Jackson* (1981) 121 Cal.App.3d 862, 873,

874 [anger at the victim may supply a motive to kill]; *People v. Arcega* (1982) 32 Cal.3d 504, 519 [same].)

There also was evidence that, between firing the first shot and firing the remaining shots, defendant paused for several seconds while he looked around the car and made eye contact with Johnson. A rational trier of fact could conclude from that evidence that defendant “made a cold and calculated decision to take [Gonzales’s] life after weighing considerations for and against.” (*People v. Mayfield* (1997) 14 Cal.4th 668, 767 (*Mayfield*), overruled in part on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 390 fn. 2.)

The manner of killing—“firing . . . shot[s] at a vital area of the body at close range, then preventing [a] witness from calling” for help—is “indicative of a deliberate intent to kill.” (*Koontz, supra*, 27 Cal.4th at p. 1082; see *Mayfield, supra*, 14 Cal.4th at p. 768 [gunshot to the face “is consistent with a preexisting intent to kill”].) That defendant fired “multiple” rounds at “an unarmed and defenseless victim who posed no threat to” him also “is entirely consistent with a premeditated and deliberate murder.” (*People v. Silva* (2001) 25 Cal.4th 345, 369.)

Defendant argues that the location of the shooting—in front of a 7-Eleven—and the presence of two witnesses shows he acted impulsively. But a murder need not be sophisticated or well-planned to be premeditated. And the presence of witnesses is not incompatible with premeditation. (See *Koontz, supra*, 27 Cal.4th at pp. 1055-1056, 1082-1083 [sufficient evidence of premeditation where defendant shot victim in front of witness].)

Defendant further contends that “[t]he ups and downs of a relationship do not provide a motive to kill.” While a fight with one’s significant other may not provide a *good* motive for murder (to the extent such a thing exists), “the law does not require that a first degree murderer have a ‘rational’ motive for killing.” (*People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102.)

***B. Claims of Error Based on Improper Volunteered Testimony***

Defendant argues a prosecution witness, San Jose Police Sergeant Patrick Guire, committed reversible witness misconduct by referencing an in-custody statement defendant made following his arrest. Defendant further complains that the testimony at issue was unresponsive. The People respond that defendant forfeited these claims of error, which they say also fail on the merits.

In advance of trial, defense counsel moved in limine for an Evidence Code section 402 hearing regarding any of defendant's statements that the prosecution planned to admit at trial. The defense took the position that any in-custody statements were involuntary and were obtained in violation of *Miranda v. Arizona* (1963) 384 U.S. 436. At a hearing on the motion, the prosecutor represented that he did not intend to introduce the statement defendant made to police in his case-in-chief. The trial court then ordered the parties not to refer to defendant's in-custody statement.

At trial, Guire testified for the prosecution that he investigated Gonzales's murder. The prosecutor asked Guire "[a]t some point did you collect a buccal swab from the defendant?" Guire responded: "So at the conclusion of the interview with [defendant], we, being myself and I interviewed with Detective Kenneth Tran when we took custody of [defendant], and Detective Tran took the buccal swab as I was standing behind him." Defense counsel did not object. The court instructed the jury "not [to] consider for any reason what was the content of [the] interview [referenced by Guire and] . . . not [to] discuss this factor in your deliberations or let it influence your decision in any way."

The People argue defendant forfeited his claims of error by failing to object to Guire's testimony or move for a mistrial. Defendant maintains his in limine motion preserved the arguments and, alternatively, contends his trial counsel rendered ineffective assistance by failing to object. We need not decide the forfeiture issue, because even assuming without deciding that the claims were properly preserved for appellate review, they fail on the merits.

A witness's improperly volunteered statement provides the basis for a mistrial where it causes incurable prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 211; *People v. Harris* (2013) 57 Cal.4th 804, 848.) “Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony . . . .” (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834.) And “ ‘[w]e presume that jurors understand and follow the court’s instructions.’ ” (*People v. Sandoval* (2015) 62 Cal.4th 394, 422 (*Sandoval*).)

Defendant argues the court’s curative instruction “most likely caused the jury to believe that [his statement was incriminating and he] did not want the jury to hear [it], because otherwise he would have tried to introduce it.” That highly speculative theory of prejudice fails in light of our presumption that jurors understood and followed the court’s instruction not to consider defendant’s in-custody statement during deliberations. (*Sandoval, supra*, 62 Cal.4th at p. 422.)

Defendant’s reliance on *People v. Bolden* (2002) 29 Cal.4th 515 (*Bolden*) is misplaced. There, a witness referred briefly to a parole office in explaining how he had obtained defendant’s address; the reference to the parole office was unresponsive to the question the prosecutor had asked and was improper, as the witness had been warned not to mention the parole office. (*Id.* at pp. 554-555.) Nevertheless, our Supreme Court concluded the trial court did not abuse its discretion in denying the defendant’s motion for a mistrial, reasoning it was “doubtful that any reasonable juror would infer from the fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction. The incident was not significant in the context of the entire guilt trial, and the trial court did not abuse its discretion in ruling that defendant’s chances of receiving a fair trial had not been irreparably damaged.” (*Id.* at p. 555.) This case likewise involves a fleeting reference, but one with much less potential to prejudice defendant’s case than the one in *Bolden*. Rather than suggesting that defendant had a criminal history, as was the case in *Bolden*, here, the reference merely informed jurors

that defendant had made a statement to police. As discussed above, in view of the curative instruction, that reference was not prejudicial.

***C. Cumulative Error***

Finally, defendant argues the cumulative effect of the alleged errors was to deprive him of his right to due process. “Under the cumulative error doctrine, the reviewing court must ‘review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.’ ” (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.) “The ‘litmus test’ for cumulative error ‘is whether defendant received due process and a fair trial.’ ” (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

We have found no errors. Therefore, defendant’s claim of cumulative error must fail.

**III. DISPOSITION**

The judgment of conviction is affirmed.



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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.